

NO. 39984-9

IN RE THE PERSONAL RESTRAINT PETITION OF:

FRANK C. EARL,

PETITIONER.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Do the recent decisions by the Washington Supreme Court on the right to a public trial impact the issues raised in this collateral attack?

B. STATEMENT OF THE CASE.

Petitioner, Frank Chester Earl, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 03-1-06167-2.

Appendix A to the State's original response. He was found guilty following a jury trial of two counts of rape of a child in the first degree, attempted rape of a child in the first degree, rape of a child in the second degree, and child molestation in the second degree. Appendix B to the State's original response. He appealed his convictions; the Court of Appeals, in a partially published decision, affirmed the convictions but remanded for correction of some sentencing errors. Appendix B to the State's original response. The mandate from this appeal issued on October 14, 2008. *Id.*

After the re-sentencing hearing, the petitioner again appealed. In an unpublished decision, the Court of Appeals dismissed the appeal.

Appendix C to the State's original response. The mandate issued on April 14, 2010.

On November 13, 2009, while this second appeal was pending, petitioner filed this timely personal restraint petition which included the claim that the court improperly conducted voir dire in a closed courtroom situation.

This court has now asked the parties to file supplemental briefing addressing on the impact of the Supreme Court's recent closed courtroom decisions in *State v. Sublett*, *State v. Wise*, *State v. Paumier*, and *In re Personal Restraint of Morris*.

C. ARGUMENT.

1. THE RECENT DECISIONS OF THE
WASHINGTON SUPREME COURT ON
COURTROOM CLOSURES DO NOT CHANGE
THE LAW APPLICABLE TO THIS CASE.

On November 21, 2012, the Washington Supreme Court issued four cases dealing with claims of courtroom closure: *State v. Sublett*, ___ Wn.2d ___, ___ P.3d ___ (2012) (2012 WL 5870484, a plurality opinion); *State v. Paumier*, ___ Wn.2d ___, 288 P.3d 1126 (2012); *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012); and *In re Personal Restraint of Morris*, ___ Wn.2d ___, 288 P.3d 1140 (2012) (plurality opinion).

In *Sublett*, a case on direct review, the Court was faced with a question of whether a closed courtroom resulted when a judge dealt with a jury question while in chambers and in the presence of counsel. The Court reasoned that neither experience nor logic would support a conclusion that this conduct implicates the core values the public trial right serves. The Court found that a discussion as to the proper response to a jury question, where there is no objection or dispute as to the response, did not constitute a closure of the courtroom as long as the question and response were made part of the record. *Sublett*, ___ Wn.2d. ___, 2012 WL 5870484 at p. 7.

As *Sublett* was a case on direct review and dealt with an alleged courtroom closure that is factually very different from the alleged closure that occurred in the instant case, this new decision has little impact on the issues now before the court in this collateral attack.

In *Wise*, a case on direct review, the court was faced with questions of whether, 1) Wise's right to a public trial was violated when the trial court conducted part of voir dire in chambers, rather than in the open courtroom, without engaging in a *Bone-Club* analysis; 2) Wise had preserved the issue for review when he did not object; 3) Wise needed to show any prejudice flowing from this error to obtain relief; and 4) assuming he was entitled to a remedy, should it be a new trial or a remand to conduct a Bone-Club analysis. In *State v. Momah*, 167 Wn.2d 140,

151–52, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 227, 232, 217 P.3d 310 (2009), the court had previously held that the public trial right in *voir dire* proceedings extends to the questioning of individual prospective jurors, so there was not much dispute in *Wise* as to whether a closure had occurred - the courtroom had been closed without the court conducting the required *Bone-Club* analysis. The opinion focused more on whether: 1) the failure to object to such a procedure constituted a waiver of the public trial right; 2) such error constituted structural error so that the defendant need show no further prejudice; and 3) the appropriate remedy for such an error was the grant of a new trial or whether a remand for a hearing on the *Bone-Club* factors. A majority of the Supreme Court held that this closure constituted a structural error not subject to a harmless error analysis, and that the defendant was not required to prove specific prejudice in order to obtain relief. *Wise*, 288 P.3d at 1119-1121. The majority also ruled that his failure to object to the in-chambers questioning did not constitute a waiver of his right to a public trial. *Id.* at 1120. Because this violation of the public trial right occurred during jury selection, the court ruled that *Wise* was entitled to a new trial. *Id.* at 1122.

In *Paumier*, a case on direct review, the court was faced with essentially the same issues that were raised in *Wise*. Accordingly the Court held:

Following the rule enunciated in *Wise*, we find that Paumier need not prove that violation of his public trial right prejudiced him. The trial court's failure to conduct a *Bone-Club* analysis was structural error that warrants reversal on appeal, with or without a contemporaneous objection.

Paumier, 288 P.3d at 1130.

Wise and *Paumier* were cases on direct review. The fourth decision issued on November 21, 2012, was *In re Personal Restraint of Morris*, and the only one which involved a case on collateral review. Morris filed a timely personal restraint petition alleging his right to a public trial had been violated when the trial court conducted part of voir dire in chambers and that, further, his appellate counsel was ineffective for failing to raise the public trial right violation on direct review. *Morris*, 288 P.3d at 1142. The record on review in Morris's case showed that the trial court had questioned 14 prospective jurors in chambers without first conducting a *Bone-Club* analysis. *Id.* On direct appeal, Morris's appellate counsel raised evidentiary issues and a claim of ineffective assistance of trial, but did not raise a claim regarding the right to a public trial. *Id.* at p. 1143-44.

The majority of the Supreme Court found that Morris's case was controlled by *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), as he had demonstrated ineffective assistance of his

appellate counsel for failing to raise the public trial right issue on direct review. Notably, the plurality opinion did not decide whether the structural error/ presumed prejudice holdings of *Wise* and *Paumier* would apply on collateral review:

We need not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.

Morris, 288 P.3d at 1143. The four justices in the two dissenting opinions questioned whether Morris had shown his appellate counsel was deficient for failing to raise the issue when the violation was not conspicuous in the record and were adamant that a showing of actual and substantial prejudice was required to obtain collateral relief. *See Morris*, 288 P.3d at 1148- 1151 (Madsen, J. dissenting), 1151- 1154 (Wiggins, J., dissenting). In short, the recent decisions on public trial rights have established some new holdings for claims raised on direct review, but have not added to the existing law when it comes to claims raised on collateral attack. The majority reaffirmed the decision in *Orange* which granted collateral relief for ineffective assistance of appellate counsel for failing to raise a violation of a public trial right claim on direct appeal when the record on appellate review showed a clear violation of that right and Orange could show that he was prejudiced by the loss of the favorable standard of

review on direct appeal where such public trial right violations are presumed prejudicial.

The decision in *Orange* has been discussed to some degree in the State's Supplemental Response (filed July 13, 2010). Petitioner is not in the same procedural posture as *Orange* as he did not challenge the effectiveness of his appellate counsel for failing to raise the closed courtroom issue in his direct appeal. Thus, his case is distinguishable from *Orange* and *Morris*, which granted relief on the ineffective assistance of appellate counsel issue – not for a violation of the right to a public trial. Thus, neither *Orange* nor *Morris* compels this court to grant relief. The Supreme Court has expressly left open whether a petitioner on collateral review raising a claim of a closed courtroom is entitled to the benefit of the presumed prejudice standard applicable to direct review.

As noted previously, the facts of this case are similar to those found in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), where the court found that a defendant's active participation in the closed proceeding and the benefits received from it made the remedy of a new trial inappropriate to the nature of the violation. 167 Wn.2d at 151-156. Here the record shows that petitioner participated in the closed proceedings – which consisted of the questioning of some jurors in the judge's chambers, primarily on topics where the jurors had requested privacy. Excerpt of

Proceedings 12/5/05 RP 26-57. Not only is there no objection to this procedure, defense counsel suggests that the court expand the number of jurors questioned in chambers so as to include a juror who had not requested privacy, but who had indicated association with a number of the State's witnesses. *Id.* at RP 50, 56. A total of eight jurors were questioned in chambers. Several had been victims of some form of sexual abuse. RP 27-29, 31-32, 40, 50. One had a son who had been raped. RP 38-39. Another had a son who had been prosecuted by the Pierce County Prosecutor's Office for a sex offenses. RP 40-45. Of the eight questioned in chambers, four were excused for cause –three because they could not be fair to the defendant and one because she was friends with the State's witnesses. RP 34, 37, 40, 57. Thus, the record shows that petitioner participated in and benefited from the closed hearing he now alleges violated his rights.


The State has previously argued in its briefing that the petitioner has failed to make any showing of actual prejudice. Under existing Washington law, he must do so to be entitled to collateral relief. As he has failed to demonstrate any prejudice the court should dismiss the claim.

D. CONCLUSION.

For the foregoing reasons the court should dismiss the petition and remand for an order correcting of the scrivener's error in the judgment.

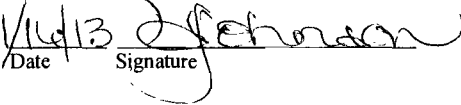
DATED: January 16, 2013.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date 1/16/13 Signature

PIERCE COUNTY PROSECUTOR

January 16, 2013 - 9:48 AM

Transmittal Letter

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